A Spring in the Desert

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Among domestic commentators, the initial response was amazement: the reference by the German Constitutional Court was perceived as a sensation and turning point. My reaction is more moderate. Judges in Karlsruhe recognise their limits and try to push the ECJ in their direction. This appears to be ground-breaking against the background of widespread media hype only. In principle, it is regular business. Judges in Karlsruhe boldly go where almost 2000 German courts, the regional Constitutional Court of Hesse and highest courts from other Member States had gone before.

By following their example, the Federal Constitutional Court (FCC) recognises reality. Its position is not much different from Angela Merkel, the German *Bundesbank* and the Parliament. Without German involvement, euro rescue operations cannot succeed – and yet German state organs are not in a position to shape events single-handedly. In this respect, the reference for a preliminary ruling is nothing unusual and reflects the wider state of European affairs. It is quite telling that the domestic debate in Germany perceives as a sensation what is (or rather: ought to be) utterly self-evident.

Most importantly, the reference changes the legal setting. Instead of grounding the argument on the German constitution, the rules for monetary union in the EU Treaties take centre state (which the justices in Karlsruhe had ignored intentionally in earlier rulings on euro rescue operations). One may disagree how to interpret these provisions, but there is no reasonable doubt that the ECB has to comply with the prescriptions in the EU Treaties. Detailed rules in Articles 119-135 TFEU and related protocols are the appropriate standard for ECB action, not the so-called eternity clause of the German constitution, the *Grundgesetz*, upon which the FCC had relied hitherto.

This change of legal context has not been paid adequate attention by Justice Gertrude Lübbe-Wolff in her otherwise excellent dissenting opinion, which may soon become a must-read for students of constitutional law on the limits of judicial review (the FCC has promised to publish an English translation). She is right to criticise the majority for having embarked upon a tour of the desert, which was bound to fail from the beginning. Contrary to her suggestion, there is a spring in the desert, which justices may head for – although they refused to see it until last week: the ECB must comply with the rules of the EU Treaties and it is the responsibility of the ECJ to guarantee that they are respected. Judges in Karlsruhe should be applauded for having recognised this.

A Worthwile Venture

Earlier German rulings on the euro crises followed a clear-cut script: the FCC's Second Senate allowed all rescue operations to move ahead and conceived ever more caveats and procedural safeguards, which did not change much in practice, but presented the court in Karlsruhe as the guarantor of rational decision-making. This model was no longer available, since the FCC cannot rely on the *Grundgesetz* to invent new provisos for ECB action for the simple reason that the latter is no German state organ.

As a result, EU Treaties had to take centre stage and Karlsruhe could not decide on their interpretation single-handedly – not even within the framework of the famous constitutional control caveats, since it had promised unequivocally that any negative verdict on ultra vires complaints or related constitutional identity reviews would be preceded by a reference for a preliminary ruling in Luxembourg. Karlsruhe had to be true to its own words. Anything else would have seriously damaged the doctrinal credibility from which German judges derive much of their professional and institutional legitimacy.

FCC: Empty threaths?

In the domestic media, some commentators presented the reference as a sort of abdication or subjugation. From a doctrinal perspective, this is wrong. In their decision, judges reaffirm that in cases of conflict the FCC remains the ultimate arbiter. The much-touted 'cooperative relationship' is a dialogue among unequals, since judges in Karlsruhe retain the last word, reflecting the status of Member States as 'Masters of the Treaties.' That is not to say that Karlsruhe will censure a negative reply from Luxembourg (see below). Yet, the FCC underlines that the threat of veto remains.

It is widely known that the President of the FCC, Andreas Voßkuhle, promotes multilevel cooperation among constitutional courts in Europe (which he labels *Verfassungsgerichtsverbund* in German). The recent decision reaffirms that such understanding is not guided b a vision of peaceful coexistence without conflicts, which the Lisbon judgment had hinted at with the almost romantic formula of judicial oversight 'hand in hand'. Cooperation may embrace disputes about correct answers, which presuppose nonetheless the existence of a conversation, which had been contained to informal channels until last week. That is why the reference is important. It demonstrates to citizens, politicians and academics both in Germany and beyond that national constitutions and supranational law complement and necessitate each other.

For that reason, the reference is of historic relevance. Arguably, earlier German rulings on the euro crisis were about much more than questions of doctrinal interpretations. Court judgments and consequent votes by the German Parliament, which the FCC had requested, brought about the discursive and symbolic

strengthening of national identity; they were building blocks for a Germany re-imagining itself as a political community. Last week's reference is an important counterpoint. It demonstrates that Karlsruhe does not have an answer to all questions. To have the last word is an incomplete substitute for the bygone constitution-centred world of German academia and politics.

ECJ: Against the Myth of a Twilight of the Rule of Law

Throughout the euro crisis, European law has been engaged in rearguard action. Most lawyers, politicians and citizens within Germany are convinced that EU Treaties have been violated flagrantly. Karlsruhe shares this opinion, as the merits of the decision demonstrate. It shows at length that the legal position of the ECB conflicts with the FCC's interpretation of primary law (tellingly, it explains the position of the ECB and *Bundesbank* only; we learn little about the standpoints of the federal government and parliament). Nonetheless, readers should not be mislead by the rhetorical vigour of the FCC's argument in support of illegality. The final conclusion is much more nuanced: the Second Senate suggests that a narrow reading of the OMT programme might satisfy its concerns.

Most media commentators assumed, in their initial reactions, that the ECJ would disagree with the FCC. I do not share this position. Judges in Luxembourg know that their position will be scrutinised most carefully within Germany (and may determine the wider perception of EU law among German lawyers and politicians for a generation). They will make an extra effort, therefore, to counter the preconception as a weak and biased judicial guardian. That is not to say that Luxembourg will block the OMT Programme (remember that even the FCC hints at a potential interpretation in conformity with EU law). Instead, the ECJ may follow the model of the referring court and opt for a 'Yes-But' ruling by allowing the OMT Programme to be retained with some caveats and conditions, mirroring earlier rulings on the euro crisis from Karlsruhe.

Judges in Luxembourg have demonstrated already that they master this technique. While few observers in Germany bother to spend much energy on the interpretation of EU Treaty rules on monetary union, the full court of 27 ECJ judges and the German Advocate General explained on many pages why a doctrinal analysis in the German tradition, which considers the wording, the structure, the drafting history and the telos of the so-called 'no bail-out' provision, may support the conclusion that the ESM Treaty complies with EU primary law. The outcome was a 'Yes-But' from Luxembourg, which allowed the ESM to move ahead under some (admittedly vague) caveats.

It may come to a similar conclusion on the OMT Programme. It should set aside uncertainties about the admissibility of the reference in order to escape the allegation of judicial desertion. Instead, it may derive certain (not: all) conditions, which the FCC supports in its detailed legal analysis, from the prohibition of monetary state

financing in Art. 123 TFEU, mirroring the argument in *Pringle*. In contrast to the FCC, the ECJ may then want to emphasise the inherent limits of judicial review in situations which require an intimate knowledge and intricate assessment of macroeconomic arguments concerning complex issues such as market pricing, the monetary policy transmission mechanism or risk of default, which lie at the heart of the FCC's legal (!) findings.

Moreover, the ECJ will have to respond to the FCC's second counter-argument on the reach of the ECB mandate with regard to monetary (not: economic) policy. Taking up the line of argument in the ECJ's *Pringle* judgment, Karlsruhe conclude that government bond purchases amount to economic policy. To focus the debate on the delineation of Treaty powers is a clever manoeuvre, since issues of competence are a focal point of constitutional review in general and resonate with the domestic constitutional ultra vires standard. To be sure, the *Pringle* judgment is flexible enough to allow for differentiation, but still proceedings will have to watched carefully on this point.

Conclusion

What will be the outcome of the episode? Assuming that the ECJ pronounces a carefully drafted and well-argued 'Yes-But' judgment, which follows some (not: all) of the FCC's arguments, the latter will have to accept this outcome (notwithstanding the fortification of the intensity of scrutiny in comparison to the *Honeywell* decision, whose assumptions are maintained at an abstract level but have been reinforced at implementing stage through a combined ultra vires and constitutional identity control). If Karlsruhe accepts the ECJ's standpoint, it may claim, nevertheless, to have been instrumental in convincing judges in Luxembourg to adopt a somewhat tough line.

The Second Senate may then be in a position to satisfy remaining concerns through domestic instructions for the *Bundesbank*, the government or parliament. Such procedural diversionary tactics could not stop the ECB, but would position the German Constitutional Court – once again – as a patron of eurosceptic currents in German society, which extend into bourgeois elite circles. Indeed, last week's decision laid the basis for future complaints in Karlsruhe through another relaxation of the admissibility criteria, which Lübbe-Wolff and Gerhardt are right to criticise in their dissenting opinions.

Maybe the Second Senate does not regret to have passed the buck to the judges in Luxembourg. Few of my colleagues in Germany have ever expected the FCC to block euro rescue operations altogether; all these 'yes-but' decisions played a central (and sometimes helpful) role in domestic debates. Yet, the immediate outcome has never been worth the media hype. Against this background, the FCC had no choice but to combine forces with Luxembourg and try to uphold jointly the rule of law.